(2)

No. 92-1550

In the Supreme Court of the United States

OCTOBER TERM, 1992

ABF FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly ordered petitioner to reinstate with backpay an employee whom the Board found had been discharged for engaging in activity protected by the National Labor Relations Act, even though a grievance committee previously had found that he had been discharged for just cause.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A20, is reported at 982 F.2d 441. The opinion and order of the National Labor Relations Board, Pet. App. B1-B28, including the decision and recommended order of the administrative law judge, Pet. App. B29-B68, is reported at 304 N.L.R.B. No. 75.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1992. The petition for a writ of certiorari was filed on March 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner ABF Freight System, Inc. operates a trucking terminal in Albuquerque, New Mexico. Pet. App. A7. Petitioner employs both regular and casual dockworkers at that facility. *Ibid.* In April 1988, petitioner negotiated a supplemental labor agreement with the Union[1] that created a new "preferential casual" dockworker classification with certain seniority rights. *Id.* at B4, B6. Based on its interpretation of the agreement, petitioner discharged 12 casual dockworkers, including employee Michael Manso, on June 20. On June 29, petitioner offered to reinstate those who agreed to waive their right to placement on the "preferential casual" list. *Id.* at A8, B7, B13.

The Union filed a grievance on behalf of the dischargees, and Manso filed an unfair labor practice charge with the Board against petitioner. Pet. App. B8, B30 n.1. On April 6, 1989, a grievance panel ordered petitioner to offer the discharged casual dockworkers reinstatement as preferential casuals, but denied all monetary claims. *Id.* at B9-B10. When Manso returned to work, however, he was warned by supervisors to "watch his step" because petitioner was "gunning" for him, and also to be "careful" because "higher management" was "after" him. *Id.* at B46. Another supervisor remarked to Manso: "Well, you made it back. Let's see how long it takes them to get rid of you this time." *Ibid.*

[1] Petitioner's employees were represented by Local 492, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the Union).

On June 19, less than two months after his return, petitioner discharged Manso, ostensibly for a second failure to respond to a work call. Pet. App. B15.[2] Manso filed a grievance, and a grievance panel ordered petitioner to reinstate him without backpay. *Id.* at B47.

Manso again returned to work. On August 11, 1989, he reported for his shift four minutes late and received a written warning. Pet. App. B47. Manso arrived late for work again on August 17, and was closely questioned by management officials. *Id.* at B47-B48. Manso claimed that his car had broken down on the highway and, in the ensuing scramble to get to work, he had been stopped by the police for speeding. *Id.* at B16. Petitioner investigated Manso's explanation and determined that it was largely a fabrication. *Ibid.* On August 21, petitioner fired Manso pursuant to a newly-instituted tardiness policy for preferential casual dockworkers, under which two incidents of lateness resulted in termination. *Ibid.* Manso grieved his discharge, but lost at the first-step hearing and did not pursue the grievance further. *Id.* at B48. Thereafter, he filed a second unfair labor

[2] The circumstances surrounding this discharge are as follows: On May 6, Manso failed to respond to a phone call summoning him to work, and petitioner issued him a written warning. Then, on June 19, supervisor Ronald Ford asked Jeff Motter, a regular dockworker, to summon Manso for work on the 8:30 a.m. shift. Motter telephoned Manso and received no answer, but Motter was tired and believed he might have misdialed the number. Motter told Ford he might have misdialed Manso's number and asked for permission to dial it again, but Ford refused and insisted that Motter sign a form verifying that the call had been placed. Pet. App. B47.

practice charge with the Board against petitioner. *Id.* at B30 n.1.

2. The Board, in agreement with the administrative law judge (ALJ), rejected petitioner's claim that the Board should defer to the grievance panel's April 6, 1989, award respecting the discharge of the casual dockworkers. The Board explained that deferral to the grievance panel's award was inappropriate under the Board's *Spielberg/Olin* policy[3] since "no evidence pertinent to the [Section] 8(a)(1) and (3) allegations * * * was placed in the record of the contractual proceeding." Pet. App. B9 n.5.[4] But, in disagreement with the ALJ, the Board held that petitioner's discharge of the casual dockworkers in June 1988 did not violate the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, because petitioner based those terminations, and its subsequent offer of reinstatement, upon a "nondiscriminatory, reasonable, and arguably

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[3] Under its discretionary deferral policy, the Board will defer to an arbitral award where the arbitrator's decision is not repugnant to the purposes and policies of the National Labor Relations Act, the arbitration proceedings are fair and regular, the parties have agreed to be bound by the award, and the unfair labor practice issue was adequately considered by the arbitrator. See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

[4] Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

correct interpretation" of the supplemental agreement. Pet. App. B13-B14.

The Board, agreeing with the ALJ, concluded that petitioner's discharge of Manso in June 1989 violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act,[5] because petitioner fired him in retaliation for participating in the grievance filed by the Union respecting petitioner's termination of the casual dockworkers in June 1988, and for filing a charge with the Board in connection with that incident. Pet. App. B15, B57-B58. Disagreeing with the ALJ, the Board further concluded that Manso's August 1989 discharge also violated Section 8(a)(1), (3), and (4). Pet. App. B21.

Regarding the latter conclusion, the Board found that the supervisors' threats of retaliation and Manso's subsequent unlawful discharge in June provided "strong evidence" of unlawful motivation respecting the August discharge. Pet. App. B18. The Board further found that the ALJ's conclusion that petitioner lawfully fired Manso because Manso lied about his reason for being late on August 17 was premised upon "a plainly erroneous factual statement of [petitioner's] asserted reasons" for the discharge. *Ibid.* The testimony of petitioner's operations man-

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[5] Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act.

Petitioner did not seek Board deferral to the grievance panel awards concerning Manso's discharges, because petitioner acknowledged that the Board will not defer to grievance/arbitration awards for discipline alleged to have violated Section 8(a)(4) of the Act. Pet. App. B59 & n.13.

ager made it clear that Manso was not fired for dishonesty; rather, his lie established only that he did not have a legitimate excuse for being late and was thus discharged under the newly-instituted policy making two incidents of lateness grounds for discharge. *Id.* at B16.[6] Finally, the Board found that "[petitioner's] treatment of Manso under the lateness policy was not consistent with its previous conduct within the disciplinary framework for preferential casuals." *Id.* at B20.[7] The Board therefore concluded that petitioner had seized upon Manso's second tardiness on August 17 "as a pretext to discharge him again and for the same unlawful reasons it discharged him" in June. *Id.* at B21. Accordingly, the Board ordered petitioner, inter alia, to make Manso whole for any loss of earnings and benefits suffered as a result of his August 1989 discharge, and to offer him immediate reinstatement as a preferential casual dockworker. *Ibid.*

3. The court of appeals affirmed, as supported by substantial evidence, the Board's finding that petitioner fired Manso in August 1989 in retaliation for his protected activity, and not for cause. Pet. App.

[6] The Board observed that "[petitioner] provided no evidence that it had treated Manso's dishonesty in and of itself as an independent basis for discharge or any other disciplinary action." Pet. App. B18.

[7] The Board observed that petitioner did not establish its lateness policy until after Manso's first infraction on August 11, but applied that policy retroactively to discharge him on the basis of the August 11 and August 17 episodes. Pet. App. B20. By contrast, petitioner did not apply its policy respecting failure to respond to work calls to infractions which had occurred prior to implementation of that policy. *Ibid.*

A18. Reviewing the record under the framework set forth by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the court of appeals found "abundant evidence of antiunion animus in [petitioner's] conduct towards Manso," Pet. App. A16, and found, further, that petitioner had failed to show that it would have discharged Manso in the absence of his protected activity. *Id.* at A18.[8]

The court of appeals also rejected petitioner's contention that the grievance panel's finding that petitioner discharged Manso for cause in August 1989 was "final and binding" upon the Board. Pet. App. A14. Citing its decision in *NLRB* v. *Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), cert. denied, 452 U.S. 930 (1981), the court observed that the Board has "wide discretion" in determining whether to defer to such an award. Pet. App. A15. The court held that, given the "ample evidence" supporting the Board's independent finding that petitioner fired Manso in August 1989 in retaliation for his protected activity, the Board acted within its discretion in declining to afford the panel's award deference. *Ibid.* Accord-

[8] In the court of appeals, petitioner did not challenge the Board's finding that Manso's June 1989 discharge was unlawful (and does not do so in this Court). Rather, petitioner claimed, in contesting the Board's finding respecting the August 1989 discharge, that the supervisors who made threatening statements to Manso in June, see page 2, *supra*, were not involved in the decision to terminate him in August, and that there was no connection between those statements and the management officials who made the decision to terminate him in August. See Resp. C.A. Br. 1-3, 31-32; Resp. Reply Br. 23-24. The court of appeals implicitly rejected that argument. See Pet. App. A16-A17.

ingly, the court affirmed the Board's order that petitioner must reinstate Manso with backpay, and rejected petitioner's contention that the Board's remedial authority respecting Manso's August discharge was limited to declaratory relief. *Ibid.*

Finally, the court of appeals rejected petitioner's assertion that, because Manso lied to petitioner about the reason for his tardiness on August 17, 1989, and repeated that untruthful explanation during his testimony before the ALJ in the unfair labor practice proceeding, considerations of public policy barred the Board from ordering his reinstatement with backpay. Pet. App. A18-A19. The court noted that the Board has "wide discretion in assessing whether, in its judgment, a particular remedy will effectuate the policies of the Act," and held that the Board did not abuse its discretion in deciding that Manso's conduct "did not rise to the level of misconduct requiring that reinstatement should be denied." *Id.* at A19.[9]

ARGUMENT

Petitioner does not directly challenge the Board's finding, upheld by the court of appeals, that it violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act by discharging Manso because he protested the discharge of the casual dockworkers by, inter alia, filing charges with the Board. Petitioner contends that, nevertheless, the Board was precluded

[9] The court of appeals affirmed, as supported by substantial evidence, the Board's finding that petitioner did not violate the Act in connection with its dismissal of the casual dockworkers in June 1988. Pet. App. A13. The employees aggrieved by that aspect of the court of appeals' decision have not sought further review of it by this Court.

from ordering Manso reinstated with backpay for two reasons: (1) the Board had to give "dispositive" effect to the grievance panel's finding that petitioner fired Manso in August 1989 for just cause, and (2) Manso forfeited his right to reinstatement and backpay by testifying untruthfully in the unfair labor practice proceeding respecting his reason for reporting late to work on August 17, 1989. Pet. 8. Neither contention warrants further review.

1. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, absent extraordinary circumstances, "[n]o objection that has not been urged before the Board * * * shall be considered by the court." This Court has made clear that a party who has prevailed before the ALJ must object to the Board's contrary decision in a petition for reconsideration in order to challenge the Board's decision in the courts. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Having reversed the ALJ's finding that Manso was discharged for cause in August, the Board issued the traditional make-whole remedy of reinstatement with backpay. In order to preserve an objection to the Board's remedy, petitioner was required to file a motion for reconsideration, but it failed to do so. Accordingly, petitioner's objection to the Board's remedy for Manso is jurisdictionally barred.

2. In any event, there is no merit to petitioner's challenge to the Board's remedy.

a. Section 10(a) of the Act, 29 U.S.C. 160(a), provides that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, law, or otherwise." The Board is thus empowered to remedy the discharge of an employee for engaging in activity protected by the Act, whether or not the discharge constitutes a breach of contract or was adjudicated under the contract grievance and arbitration procedure. See *NLRB* v. *Strong*, 393 U.S. 357, 362 (1969); *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 271-272 (1964).[10] Although the Board will defer to contractual grievance resolution processes in some circumstances, it will not do so when, as here, the unfair labor practice claim alleges retaliation for resort to the Board's processes. Page 5 note 5, *supra*; see *International Harvester Co.*, 271 N.L.R.B. 647 (1984); *Filmation Associates, Inc.*, 227 N.L.R.B. 1721 (1977). See also *Grand Rapids Die Casting Corp.* v. *NLRB*, 831 F.2d 112, 115-116 (6th Cir. 1987).

Petitioner did not challenge the Board's deferral policy in regard to Manso's discharge before the

[10] The cases cited at Pet. 7-9 are inapposite. For the most part they involve the deference that courts must give to arbitral determinations. See, *e.g.*, *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Owens* v. *Texaco, Inc.*, 857 F.2d 262 (5th Cir. 1988), cert. denied, 490 U.S. 1046 (1989). "The relationship of the Board to the arbitration process is of a quite different order" from that of the courts to the arbitration process. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436 (1967). *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975), see Pet. 9, is also inapposite. There, the Court held that employees represented by a union had no right to bypass the contractual grievance process, and demand direct negotiations with the employer on their complaints of racial discrimination, where the labor contract made such discrimination a grievable issue.

Board or before the court of appeals, and petitioner does not directly challenge that policy here. Rather, petitioner contends, Pet. 10-16, that, because the grievance committee upheld Manso's discharge, the Board is limited to providing "declaratory, injunctive, and other equitable relief," Pet. 9; according to petitioner, the Board may not order Manso's reinstatement with backpay. That is so, petitioner maintains, because Section 10(c) of the Act, 29 U.S.C. 160(c), prohibits the reinstatement of any employee discharged for cause.[11]

But if the Board was not required to defer to the grievance panel's determination that Manso was discharged for violation of the Company's tardiness policy and was free to find (as it did) that, in fact, he would not have been discharged except for his protected activity, it follows that the Board could conclude, contrary to the view of the grievance panel, that Manso was *not* discharged for cause. Therefore,

[11] Section 10(c) of the Act, 29 U.S.C. 160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice * * * the Board shall state its findings of fact and shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]. * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

the Board did not offend Section 10(c) by ordering Manso reinstated with backpay. Section 10(c) precludes such relief only where the employee "was * * * discharged for cause," not where, as here, the reliance on cause is shown to have been a pretext.[12]

b. Petitioner further contends, Pet. 16-20, that it is contrary to the policies of the Act to reinstate Manso with backpay because he testified untruthfully in the Board proceeding, and that the decision of the court below in upholding the Board's order in these circumstances conflicts with decisions of other courts of appeals. This claim is also without merit.

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[12] The cases relied on by petitioner, Pet. 11, in which courts found that a discriminatorily discharged employee nevertheless was not entitled to reinstatement, are distinguishable. In two cases the employees denied reinstatement had engaged in serious misconduct or were unfit for continued employment. See *NLRB* v. *Big Three Industrial Gas & Equipment Co.*, 405 F.2d 1140, 1143 (5th Cir. 1969) ("incompatible with the safety on the public highways" to reinstate truck driver with serious traffic infractions); *NLRB* v. *Apico Inns of California, Inc.*, 512 F.2d 1171, 1173-1176 (9th Cir. 1975) ("reprehensible" and "egregious" conduct, including lewdness toward co-employees and customers and sexual harassment of co-employees). In *Montgomery Ward & Co.* v. *NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981), and *Pacific Tel. & Tel. Co.* v. *NLRB*, 711 F.2d 134, 137-138 (9th Cir. 1983), the employees were concededly discharged for cause; the courts disagreed with the Board that reinstatement was nonetheless appropriate because the employees had been denied the right to union representation in the investigatory process. In *General Teamsters Local No. 162* v. *NLRB*, 782 F.2d 839 (9th Cir. 1986), the Board, upheld by the court of appeals, denied reinstatement and backpay to employees guilty of egregious acts of misconduct during a strike.

The Board will withhold its usual remedy of reinstatement with backpay from a discriminatee who makes false statements at a Board hearing when the discriminatee's conduct "was intended to or in effect amounted to a malicious abuse of the Board's processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act." *Service Garage, Inc.*, 256 N.L.R.B. 931, 931 (1981), enforcement denied on other grounds, 668 F.2d 247 (6th Cir. 1982); *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), order enforced, 872 F.2d 413 (3d Cir. 1989) (Table). In deciding whether denial of reinstatement is appropriate, the Board examines all of the relevant facts, including whether the ALJ credited the employee's testimony respecting the underlying violation of the Act, whether the employee was otherwise a generally trustworthy witness, and whether the employer demonstrated that the employee was unfit for further employment. *E.g.*, *Owens Illinois, Inc.*, *supra*.

The court of appeals correctly held, Pet. App. A19, that the Board did not abuse "its considerable discretion in deciding that Manso's conduct in this case did not rise to the level of misconduct requiring that reinstatement should be denied." Thus, although Manso testified falsely respecting his reason for reporting to work late on August 17, that fabrication was an isolated lapse in what was otherwise truthful testimony. The ALJ specifically credited Manso's testimony about threats of retaliation he received from petitioner's supervisors upon returning to work in June, *id.* at B46, and the Board found that testimony "stong evidence" of unlawful motivation respecting the August discharge. *Id.* at B18. Fur-

ther, petitioner did not show that the lie (which did not misrepresent any occurrence in the course of employment or at the employer's premises) made Manso unfit for further employment as a preferential casual dockworker.

Petitioner relies principally on *Precision Window Mfg., Inc.* v. *NLRB*, 963 F.2d 1105 (8th Cir. 1992). Pet. 17-19. But in that case the court found reinstatement inappropriate, not merely because the employee had lied, but also because he had threatened to kill his supervisor. 963 F.2d 1109. Moreover, as the court below pointed out in distinguishing *Precision Window*: "There the employee lied in the first instance during the administrative hearing by misrepresenting facts that were highly relevant to determining whether he was fired for his union activity. Here, to the contrary, Manso's original misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." Pet. App. A19. That fact distinguishes this case from *Precision Window* and from the other cases cited by petitioner.[13]

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[13] The other cases that petitioner relies on are factually distinguishable. In *NLRB* v. *Magnusen*, 523 F.2d 643, 646 (9th Cir. 1975), see Pet. 17, 18, the employee "stole from his employer and * * * severely impeded the vital fact-finding process by repeated lying" (footnote omitted). In *Iowa Beef Packers, Inc.* v. *NLRB*, 331 F.2d 176, 185 (8th Cir. 1964), see Pet. 18, the employee made false representations in his unfair labor practice charge as well as gave false testimony at the Board hearing. In *NLRB* v. *Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964), see Pet. 18, the court rejected the Board's decision to credit the testimony of an employee that he had been discharged because the employee was a dishonest witness. The court's statement that even if the employee had been discharged, his dishonesty would have precluded reinstatement, was dictum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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